No. 93-766

In The

Supreme Court of the United States

October Term, 1993

JULIUS RYTMAN, DORA RYTMAN, COLCHESTER EGG FARMS, INC., RYTMAN GRAIN, INC., JULIUS AND DORA RYTMAN PROPRIETORSHIP, PINECREST DUCK FARM TRUST, AND AGRI-FINANCE, INC.

Petitioners,

vs.

KOFKOFF EGG FARM LIMITED PARTNERSHIP, SAMUEL KOFKOFF, ROBERT KOFKOFF, JOSEPH FORTIN, BLAIR HAGY, COLCHESTER FOODS, INC., PIERCE HOLLOW FARMS, FITCHVILLE REALTY, INC., CONNECTICUT NATIONAL BANK, NORWICH SAVINGS SOCIETY, BROWN, JACOBSON, JEWETT & LAUDONE, P.C. N/K/A BROWN, JACOBSON, TILLINGHAST, LAHAN & KING, P.C., MILTON JACOBSON, AND GLENN GORDON

Respondents.

Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

I. PETITIONERS RESPONSE TO RESPONDENTS COUNTERSTATEMENT OF FACTS

The Petitioner, in this counterstatement of facts, will address those statements made by the Respondents. Contrary to Respondents' assertions, Petitioners' did plead the following in the proposed Amended Complaint:

A. CNB converted funds belonging to Petitioners (e.g. Appendix Vol. 1, pp. 51-55, 63-65, 135-141);

B. Norwich controlled Petitioner's Enterprise's liquidations (Appendix, Vol. 1, pp. 55-61, 86-87, 90-96, 116-119, 154-155);

C. Respondents acquired all of Petitioners assets (Appendix Vol. 1, pp. 119-134, 150-160);

D. Petitioners were solvent and had more than enough assets to pay all of their obligations to Kofkoff, CNB, and Norwich (Appendix Vol. 1, pp. 60, 75, 78-79).

Further, contrary to Respondents assertion that Petitioners first asked for Leave to Amend on September 18, 1992 (Respondents Brief, p. 5) Petitioners requested the opportunity to amend in three separate memoranda of law, two dated June 19,

1992 and one dated July 17, 1993 (Second Circuit Joint Appendix, pp. 221-2, 257, 297). Therefore, the first request for leave to amend was made within 23 days of the first motion to dismiss long before the District Court ruled on the original State Court Complaint. The District Court never acted on those requests.

The Respondents note in footnote 4 that the Petitioner included the proposed Amended Complaint in their Appendix and not the State Court Complaint. The District Court found that the Amended Complaint was just a longer version of the State Court Complaint. Therefore, if the Amended Complaint states a claim, as a matter of law, then the State Court Complaint must also have stated a claim as a matter of law. Therefore, this Court has the proper document to review. Additionally, if the Petitioner seriously believed that the State Court Complaint was deficient, then they could have included it in an Appendix.

II. REPLY TO RESPONDENTS' BRIEF

II. A. RESPONDENTS IGNORE THE CONFLICT ARISING FROM THE SECOND CIRCUITS' USE OF THE "ABUSE OF DISCRETION" STANDARD IN REVIEWING PETITIONERS' LEAVE TO AMEND

The Second Circuit applied the wrong standard of review in examining Petitioner's Amended Complaint (Petition for Certiorari pp. 9-18). The Respondents have failed to brief the issue as to what was the proper standard except to say that it is the abuse of discretion standard. The cases cited in Petitioner's brief hold that a de novo review of an Amended Complaint is required if the leave to file an Amended Complaint is denied because it fails to state a claim as a matter of law. In light of the fact that the Second Circuit applied an abuse of discretion standard and the District of Columbia Fifth, Sixth, and Eleventh Circuit apply a de novo review standard, a conflict among the Circuits clearly exists. Vild v. Visconsi, 956 F.2d 560 (6th Cir. 1992) Cert denied ___U.S.___ 113 S.Ct. 99 (1993); Gaubert v. Federal Home Loan Bank Board, 863 F.2d 59 (D.C. cir. 1988); Dussouy v. Gulf Coast Investment Corp.,

660 F.2d 594 (5th Cir. 1981), 660 F.2d 594; Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990). The Petitioners ask this Court to resolve the conflict. Additionally, since the Second Circuit did not read the proposed Amended Complaint, it did not even properly assertain whether the District Court had abused its discretion. The Second Circuit completely abdicated its appellate function by any standard.

The Respondents are just wrong when they say "Petitioners reliance on Vild v. Visconsi, 956 F.2d 560 (6th Cir. 1992), cert. denied ___U.S.___ , 113 S.Ct. 99 (1993) is misplaced". (Respondents Brief p. 9). Vild held that when a leave to amend a complaint is denied because the amendment would not withstand a Motion to Dismiss the standard of review for the Circuit Court is de novo and not "abuse of discretion" standard.

The issue presented to the Second Circuit was exactly the same issue. The District Court dismissed the complaint for failure to state a claim and denied Petitioner's Request for Leave to

Amend on the basis that "[t]he proposed amended complaint *** fails to remedy the deficiencies prompting judgment for the defendants [which was a dismissal under Rule 12 b(6)]." App. p. 23.

There clearly is a conflict between the Circuits on this issue. Additionally, the idea that a District Court's denial of a request for leave to amend a complaint on the basis that it "fails to state a claim" is reviewable on an abuse of discretion standard is contrary to the whole body of jurisprudence that requires such rulings to be reviewed de novo and that review requires a finding that no relief could be granted under any set of facts that could be consistent with the allegations. H.J., Inc. v. Northwestern Bell Co., 492 U.S. 229, 249-250, 109 S.Ct. 2893, 2906 (1989); Hishon v. King of Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984).

II. B. THE PLAIN MEANING OF F.R.C.P. 81(C) REQUIRES A REVERSAL OF THE SECOND CIRCUIT'S OPINION

As outlined in the Petition, F.R.C.P. 81(c) requires that the state Complaint, removed to

Federal Court, is "deemed adequate when it enters the Federal Courts ....". In the absence of a court order ("Repleading is not necessary unless the Court so orders." F.R.C.P. 81(c)), the Petitioner's were not required to replead and should have been given the opportunity to bring the pleading into conformance with any rule the court deemed necessary in the federal action. Granny Goose Foods, Inc. v. Brotherhood of Teamsters, etc., 415 U.S. 423, 435-36 (1974); Matter of Meyerland Co., 960 F.2d 512 (5th Cir. 1992) cert. denied ___U.S.___ , 113 S.Ct. 967; Lally v. Allstate Ins. Co., 724 F.Supp. 760, aff'd 830 F.2d 28 (9th Cir. 1989); Recchion v. Kirby, 637 F.Supp. 284, 289 (WD Pa. 1985), citing 7A, Wright & Miller, Federal Practice and Procedure, Section 1824 at 312 (1972). (See Petition for Certiorari, pp. 18-22). Despite this fact, the Petitioner did seek leave to amend within twenty-three days of the filing of the first Motion to Dismiss (as part of their timely response to the Motion to Dismiss) two more times thereafter and again after the District Court

granted the Motion to Dismiss and Summary Judgment. Although the Petitioners clearly tried to replead by their own initiative four times on which the District Court failed to rule only on the last one, namely, Amended Complaint in the Appendix, which it just summarily denied, this case presents a clear opportunity to deal with who has the obligation to conform pleadings to the federal practice when a case is involuntarily removed to the Federal Court. Regardless, who has the obligation (1) the Court by ordering repleading, (2) defendants by affirmative motion or (3) the plaintiffs by its own initiative (which was clearly done in this case).

The language of F.R.C.P. 81(c) could be clearer or plainer. The Petitioners followed the rule and in fact, took affirmative action in seeking leave to amend even absent a Court Order. The decision of the Second Circuit's conflict with the language of Rule 81(c), the Supreme Court, and the Fifth and Ninth Circuits.

II. C. THE STANDARD APPLIED BY THE LOWER COURTS TO THE F.R.C.P. 56(f) MOTION WAS NOT THE ONE RESPONDENTS' ASSERT SHOULD HAVE BEEN APPLIED

The Respondents assert that the standard of review to be applied to a Rule 56(f) motion is set forth in Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy, 891 F.2d 414 (2d Cir. 1989). (Respondents Brief, pp. 14-15). In fact, this case the Second Circuit ignored the standard set forth by the Respondents and created a new standard for determining when Summary Judgment Motions can proceed without discovery. The Second Circuit's standard that if there had been lengthy time spent on previous discovery in another action, that is the sole criteria, for upholding the District Court's denial of Petitioners' discovery requests. Such a new standard is directly contrary to the requirement that the non-movant party has full opportunity to conduct discovery set forth in Celotex Corp. v. Catrett, 477 U.S. 317 (1986) before Summary Judgment Motions can be heard. Further, unlike in the Hudson case, the trial court, in this case, made no finding of any kind as

to why Petitioners request for discovery was denied. The number of days spent doing discovery in the state action is not a factor in the standard set forth by the Respondents nor should it be. The factual allegation spans for many years and transactions involving millions of dollars and thousands of transactions.

The cases relied upon by the Second Circuit involve cases in which the parties obtained full discovery. Ruffolo v. Oppenheimer, 987 F.2d 129, 131-32 (2d Cir. 1993); Billard v. Rockwell International Corp., 683 F.2d 51, 57 (2d Cir. 1992). As outlined in Petitioner's brief (pp. 45-53), full discovery was not done in this case. In fact, discovery had hardly been started and the first set of Interrogatories by the Petitioners had not even been answered. Additionally, Petitioners claimed that new evidence had arisen through NSS Summary Judgment Motion and affidavit in support of that motion and those issues need to be examined and discovery conducted. This Second Circuit decision is in conflict with Rule 56(f) and many

other Circuits, e.g., Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992); Secretary of Labor, U.S. Department of Labor v. Burger King Corp., 955 F.2d 681 (11th Cir. 1992); Miller v. Beneficial Management Corp., 977 F.2d 834, 846 (3rd Cir.1992); Snook Trust Co. of Georgia Bank of Savannah, 859 F.2d 865, 870 (11th Cir. 1988); (citing Littlejohn v. Shell Oil Co., 488 F.2d 1140, 1145 (5th Cir. 1973) (en banc), cert. denied, 414 U.S. 1116); Sames v. Gable, 732 F.2d 49, 51 (3rd Cir. 1984); Burnside-Ott Aviation Training Center, Inc v. U.S., 985 F.2d 1574, 1582 (9th Cir. 1993).

Clearly, the Second Circuit's position to affirm a ruling on Summary Judgment where virtually no discovery has been conducted in the instant case (and even where discovery has been conducted, but not completed, in a related case but where the RICO claims were not made) is contrary to Rule 56(f) especially where no findings were made as to why discovery was not allowed.

Even more importantly, the Petitioners know of no requirement that a party conduct "defensive

discovery" or "anticipatory discover" in a related case to defend against or anticipate a summary judgment motion that might be filed in a Federal RICO case (or any separately brought case). This is particularly true where Petitioners' position is that the party moving for Summary Judgment has filed a false affidavit presenting factual and legal issues not raised before in the other action. To bar discovery in this case, was just contrary to Rule 56(f) and accepted authority. The Supreme Court should resolve this issue.

II. D. WHAT CONSTITUTES "UNLAWFUL CONDUCT" AS A MATTER OF A LAW IS A LEGAL QUESTION AS OPPOSED TO A FACTUAL QUESTION

(i.) THIS APPEAL DEALS WITH FINDINGS OF LAW NOT FACT

The legal question presented by this Petition for Certiorari is whether the Petitioners' claims constitute unlawful conduct under RICO. The petitioner contends that the Second Circuit's definitions of what constitutes "unlawful conduct" is in conflict with other Circuits. The statement that the Petitioners' claims are as a matter of law not "unlawful" under RICO is a legal question and

not a factual question. In short, the Respondents have entirely missed the issues and their reference to Graver Tank & Mfg. Co., Inc. v. Linda Air Products Co., 226 U.S. 535, 695 Ct. 535 (1949) is just wrong. Graver Tank dealt with an appeal after a trial on the merits and whether the evidence supported the findings of fact. The same is true about United States v. Johnston, 268 U.S. 220 (1925) where the Supreme Court refused to review the factual determination of a jury after a criminal trial. The Petitioners are not asking this Court to reverse a factual finding of a trier of fact. The Petitioners are asking the Second Circuit and now this Court to review the factual allegations to see if "it is clear that no relief could be granted under any set of facts that could be consistent with the allegations". Hishon v. King of Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984) quoted in H.J., Inc. v. Northwestern Bell Co., 492 U.S. 229, 249-250, 109 S.Ct. 2893, 2906 (1989) (reversing a dismissal of a RICO claim where the Supreme Court indicated that its role was

read the complaint).

Although many (a minimum of 117) predicate acts are alleged, e.g. mail and wire fraud, state larceny and extortion, a major issue squarely presented to this Court is whether the Hobbs Act applies to business transactions. The Second Circuit held, as a matter of law, that it does not thereby concluding that the factual allegations did not plead "unlawful conduct". Nationwide the Hobbs Act is being pled in business contexts, this case being one of the more dramatic and egregious ones, therefore, the Court should grant certiorari on this issue. (See Petition for Certiorari, pp. 30-42).

(ii.) REVES V. ERNST & YOUNG SHOULD NOT HAVE BEEN REFERRED TO BY THE SECOND CIRCUIT IN THIS SECTION 1962(B) CASE

Additionally, in light of the fact that the Second Circuit quoted Reves v. Ernst & Young, ___ U.S.___ 1113 S.Ct. 1163, 1173 (1993) for the standard upon which to review the factual allegations relative to "control" makes this case (a 18 U.S.C. Section 1962(b) case where Reves, by

its language, was limited to Section 1962(c)) of even greater significance nationwide. This Court can address whether Reves definition of "control" for Section 1962(c) should be expanded to Section 1962(b) or whether Reves will be limited to Section 1962(c) cases as the decision clearly states.

(iii.) PREDICATE ACTS BASED ON STATE CRIMINAL STATUTES HAD TO BE ADDRESSED BY THE SECOND CIRCUIT

The Respondents also missed Petitioners point on predicate acts involving state crimes namely, the Second Circuit must review those predicate acts before dismissing the Complaint. The issue presented here is exactly the same as the issue presented in Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984).

In Battlefield Builders, the Fourth Circuit reversed the District Court's dismissal of the complaint where the District Court stated:

> [t]he plaintiff is suing the defendant and if its allegations are true, it might have an approval claim, but it is at best a garden-variety commercial breach of contract, perhaps fraud, even perhaps conspiracy. But

> this is not what RICO was designed to remedy. I agree, it does not have to be organized crime, but it seems to me it has to be some pattern of something that would be called racketeering or enterprise of some sort. That just does not meet that.

Id., 1062-63. This statement is very similar to what the District Court stated in its decision on this case:

> A series of breaches of contract are alleged. Further, plaintiffs strongly indicate the extent of their displeasure with the way these events unfolded. However, such does not compromise a scheme to defraud plaintiffs through criminal acts.

App. p. 17. The District Court, in this case, refused to find unlawful conduct and noted that even if the defendants' conduct was "conspiratorial in nature", Id, no RICO claim was present.

The Fourth Circuit reversed the lower court in Battlefield, holding that the allegations sufficiently alleged extortion and attempted extortion under Virginia law the "plaintiffs did allege a cause of action which is immune to a Rule 12 motion to dismiss." 743 F.2d at 1063.

The Second Circuit (and the District Court) did not address nor consider the state predicate acts

of extortion and attempted extortion when they did their analysis. Therefore, the Second Circuit is in conflict with the Fourth Circuit and the explicit and clear language of 18 USC Section 1961(1)(A) making certain state law crimes predicate acts under RICO of which Connecticut criminal extortion is clearly one.

(iv.) THE FULL COMPLAINT HAS TO BE REVIEWED DE NOVO FOR PROPER CIRCUIT COURT REVIEW

The District Court and the Second Circuit limited their review of the Complaint from the Petitioners default on their loans in February 1987 forward and then limited the analysis of those claims. Crucial to Petitioners' RICO claim is that Respondents caused the default by their predicate acts and unlawful conduct. The District Court and the Second Circuit failed to address the wrongful conduct by the Respondents causing the default and in fact, failed to address the major claims of unlawful conduct against each group of defendants that make up the Respondents. The refusal of the Second Circuit to review all of the allegations of

the Complaint is contrary to accepted practice. Hishon, supra, H.J., Inc., supra, Schriver v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1956); Swistock v. Jones, 884 F.2d 755 (3rd Cir. 1989).

The allegations not addressed by the Second Circuit concerning unlawful conduct prior to the default at Appendix A1-19 through and through A1-86 in the Amended Complaint. Even after the default, there are many allegations of predicate acts which are not addressed. Predicate acts of mail and wire fraud, state extortion and Hobbs Act claims can be seen by even cursory reading of the Amended Complaint. The failure of the Circuit Court to include these claims (and just rubber stamping the District Court) sets a standard under Rule 12(b)(6) that is just contrary to the Federal Rules and the above mentioned decisions of this Court and other Circuits.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Certiorari, the Petition for Certiorari should be granted.

Respectfully submitted,

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